Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1977

No. 77-167

MILDRED WATTS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

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OPINION BELOW

There is no reported opinion of the Supreme Court of Virginia. The order rejecting the petition for a writ of error is set forth in the petitioner's petition for writ of certiorari on page 10.

JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. **Whether The Refusal Of The Trial Court To Permit Dr. Harry E. Sutelan, Jr. To Testify Was A Violation Of The Due Process Clause Of The Fourteenth Amendment To The United States Constitution?**

II. **Whether The Refusal Of The Trial Court To Dismiss The Criminal Warrant For Lack Of Evidence And A Faulty Description Of The State Statute Was A Violation Of The Due Process Clause Of The Fourteenth Amendment Of The United States Constitution?**

III. **Did The Trial Court's Conclusion, Before The Petitioner Offered Any Evidence, In Ruling On A Motion To Strike The Commonwealth's Evidence, That It Was Going To Continue The Case Generally For One Year, And Would Put The Petitioner In Jail For Contempt Of Court If She Had Individuals Living In Her Home Without A License And, Further, Would Impose The The Maximum Jail Time For Such A Violation, A Violation Of The Due Process Clause Of The Fourteenth Amendment Of The United States Constitution?**

STATEMENT OF THE CASE

The petitioner was tried by the court sitting without a jury on September 17, 1976, in the Circuit Court of the City of Norfolk on a charge of operating a rest home in the City of Norfolk in violation of § 63.1-182, Code of Virginia (1950), as amended.

The evidence adduced by the Commonwealth showed that on April 6, 1976, a Norfolk City Policeman was voluntarily admitted into the defendant's residence. Inside he observed five aged individuals who were not related to the defendant and who appeared to be living in the residence. Additionally, the officer testified that the front portion of the house had been converted into a church and contained approximately 15 to 17 church-type pews used for religious

ceremonies (Tr. p. 14). The officer also testified that the second floor of the residence contained approximately 15 beds (Tr. p. 14).

The record indicates that Hugh Ferrell, one of the individuals living with the defendant, testified that he was 85 years old; Lewis Westbrook, another resident, testified that he was 63; Luke Williams, a third resident, testified that he was 61 and Anne Fenk testified that she was 57.

It is to be noted that the defendant, in her own behalf, testified that she cooked meals and washed clothes for everyone in the house (Tr. p. 70), that residents were "admitted" to her home (Tr. pp. 82-84), and that Hugh Ferrell was "placed in her care" (Tr. p. 13).

ARGUMENT AGAINST GRANTING THE WRIT OF CERTIORARI

I. **The Refusal Of The Trial Court To Permit Dr. Harry E. Sutelan, Jr. To Testify Is Purely A Matter Of State Law And Is Not A Violation Of The Due Process Clause Of The Fourteenth Amendment To The United States Constitution.**

Initially, the Commonwealth submits that the only real questions that the petitioner raises in her petition turn on the particular facts of this case alone and are of interest only to the parties in it. In essence, it is submitted that the petitioner asks this Court to make another review of the trial record to see if it will decide this case in a manner different from that of the Circuit Court of the City of Norfolk and the Supreme Court of the Commonwealth of Virginia. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnson,* 268 U.S. 220, 227 (1925). Moreover, in the realm of factual review and analysis, the rulings

of the court below, it is submitted, should be treated with and entitled to great weight. In the present case, the petitioner raises only questions turning entirely on the facts of this case, already resolved twice in favor of the respondent, without any impact outside the limits of this case. For this reason alone, it is submitted, certiorari should be denied.

The Commonwealth advances the position that the specific testimony of Dr. Sutelan was properly excluded as being irrelevant. The transcript reveals that Dr. Sutelan was asked if he examined Annie Fenk, Lewis Westbrook, Hugh Ferrell, Luke Williams, and Lena Goodman on May 13, 1976. The objection to that evidence was that this date was approximately one month after the date of the alleged offense. The trial court sustained the objection on the basis that the evidence was irrelevant to the condition of the named individuals on the date of the offense (Tr. pp. 100-102).

It is well settled that matters dealing with the admissibility of evidence and state law and procedure do not raise federal constitutional questions. *Grundler* v. *North Carolina,* 283 F.2d 798 (4th Cir. 1960); *Faust* v. *North Carolina,* 307 F.2d 869 (4th Cir. 1962); *Moore* v. *Illinois,* 408 U.S. 786, 33 L.Ed.2d 706, 92 S.Ct. 2562 (1972). The Commonwealth would note at this juncture that the petitioner did not make the argument that the refusal of the trial court to permit Dr. Sutelan to testify violated the due process clause of the United States Constitution to the Supreme Court of Virginia, nor was this issue raised at trial. Therefore, it is submitted that that issue is not properly before this Court and the petition of certiorari should be denied for this reason alone. *See Moore, supra,* at 716.

II. The Refusal Of The Trial Court To Dismiss A Criminal Warrant For Lack Of Evidence And Faulty Description Of The State Statute Was Not A Violation Of The Due Process Clause Of The Fourteenth Amendment To The United States Constitution.

It appears that the thrust of the petitioner's question No. II is that the warrant issued in the case at bar was defective because it charged the petitioner with operating a rest home without a license and the statute allegedly violated prohibits the operation of a home for adults. The Commonwealth contends that the warrant complies fully with the form and content enunciated in the Rules of the Supreme Court of Virginia. Rule 3A:4(c)(1) provides:

> "The warrant shall [i] be directed to an appropriate officer or officers, [ii] name the accused or, if his name is unknown, set forth the description by which he can be identified with reasonable certainty, [iii] describe the offense charged, substantially as provided in Rule 3A:7(a), [iv] command that the accused be arrested and brought before a court of appropriate jurisdiction in the county, city or town in which the warrant was issued . . . ."

Rule 3A:7(a) provides:

> "The indictment or information shall be a plain, concise and definite written statement, (1) naming the accused, (2) describing the offense charged and citing the statute or ordinance that defines the offense or, if there is no defining statute or ordinance, prescribes the punishment for the offense, (3) identifying the county, city or town in which the accused committed the offense, and (4) reciting that the accused committed the offense on or about a certain date. In describing the offense, the indictment or information may use a name given to the offense by the common law, or the indictment or information may state so much of the common

law or statutory definition of the offense that it is sufficient to advise what offense is charged. Error in the citation of the statute or ordinance that defines the offense or prescribes the punishment therefor, or omission of the citation, shall not be ground for dismissal of an indictment or information, or for reversal of a conviction, unless the court finds that the error or omission prejudiced the accused in preparing his defense."

Rule 3A:12(c)(1) provides:

"Defenses and objections based on defects in the institution of the prosecution or in the written charge upon which the accused is to be tried, other than that it fails to show jurisdiction in the court or to charge an offense, must be raised by motion made within the time prescribed by paragraph (d) of this rule."

Rule 3A:12(d) provides that:

"A motion referred to in subparagraph (c)(1) shall be filed or made before a plea is entered and, in a court of record, at least 7 days before the date fixed for trial."

It is submitted that in the instant case the defendant, contrary to the provisions of Rules 3A:12(c)(1) and 3A:12(d), did not make a timely objection to the warrant. Further, the Commonwealth would point out that the petitioner has not alleged, at any stage, that the language of the warrant issued in the instant case prejudiced her in preparing her defense. *Cf. Gerstein* v. *Pugh,* 420 U.S. 54 (1975). Consequently, it is submitted that the petitioner has failed to comply with the procedural requirements for raising a proper objection to the warrant. In *Wainwright* v. *Sykes,* ..... U.S. ....., 53 L.Ed.2d 594, 97 S.Ct. ..... (1977), this Court held that, in a habeas corpus context, where a state procedural rule which, consistent with the United

States Constitution, required that a criminal defendant's confession be challenged at trial or not at all, was coupled with the defendant's failure to timely object to a confession's admission, this constituted an independent and adequate state procedural ground for rejecting the defendant's subsequent petition for habeas corpus, and this Court opined that it was prevented from direct review of the state court's decision. This Court opined that this result obtains because a state procedural rule which requires that a contemporaneous objection be made to the admission into evidence of a criminal defendant's confession deserves great respect from federal courts, because of the facts that it is a rule employed by a coordinate jurisdiction within the federal system and for the many interests it serves in its own right; it enables the record to be made with respect to the federal constitutional claim on the recollections of witnesses refreshed; and it enables the judge who observes the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question.

It is submitted that the requirements of Rules 3A:12(c)(1) and 3A:12(d) provide a "contemporaneous objection" requirement analogous to the one found in *Wainwright, supra.* Thus, the Commonwealth urges that the failure of the petitioner to comply with the procedural rule precludes review pursuant to the doctrine of *Wainwright.*

In addition to the failure of the trial court to dismiss the criminal warrant because of its alleged faulty description of § 63.1-182, Code of Virginia (1950), as amended, the petitioner in question No. II, alleges that the evidence adduced was insufficient to sustain the conviction. At the outset it is important to note that the standard for this Court is that the evidence should be viewed in the light most favorable to the state. *Cf., Glasser* v. *United States,* 315 U.S. 60, 80 (1941). In *Thompson* v. *Louisville,* 362 U.S. 199

(1960), and in *Garner* v. *Louisiana,* 368 U.S. 157 (1961), this Court recognized that the appropriate standard for the review of allegations of insufficient evidence to sustain the underlying conviction is "not on the sufficiency of the evidence, but rather [the] conviction rests upon any evidence at all." 362 U.S. 199; *accord, Garner* v. *Louisiana, supra* at 163; *Shuttlesworth* v. *Birmingham,* 382 U.S. 87, 94 (1965). The petitioner admits in her petition for a writ of certiorari that evidence was adduced by the Commonwealth that the petitioner was operating a home in violation of § 63.1-182, Code of Virginia (1950). Not only did officer Cameron testify that various persons not related to the defendant made her home their residence, several of the residents themselves testified that they lived with the petitioner and, further, testified as to their age. Thus, it is submitted that the "no evidence" test enunciated by Thompson was satisfied by the Commonwealth and the petition should be denied for that reason.

Again, it is to be noted that the due process issue raised by the petitioner in this question was not raised at trial and on appeal and, therefore, is not properly before this Court pursuant to *Moore, supra.*

III. The Trial Court's Conclusion, Before Petitioner Offered Any Evidence, In Ruling On Her Motion To Strike The Commonwealth's Evidence, That It Was Going To Continue The Case Generally For One Year, Would Put Petitioner In Jail For Contempt Of Court If She Had People Living In Her Home And Had No License, And Would Impose The Maximum Jail Time Was Not A Violation Of The Due Process Clause Of The Fourteenth Amendment To The United States Constitution.

The Commonwealth submits that a review of the record of the trial of the petitioner clearly indicates that contrary to the petitioner's assertion in question No. III rather than the trial court ruling that it was going to continue the case

against the petitioner generally and fine her to the maximum if a violation of § 63.1-182 was discovered, the court merely proposed that alternative (Tr. pp. 63-65). When petitioner's counsel noted to the court that his motion to strike the Commonwealth's evidence had not been ruled on and that he had not put on any evidence on behalf of his client, the court, apparently, decided against the general continuance of the case and overruled the motion to strike and allowed petitioner to present her case (Tr. p. 65). Therefore, it is submitted that there was no Fourteenth Amendment violation. In fact, the actual sequence of events in the petitioner's trial progressed just as if the court had not "thought out loud" and made any mention of continuing the case.

Once again, it is submitted that the petitioner has raised the due process argument for the first time in this petition and it is, thus, not properly cognizable by this Court.

CONCLUSION

The Commonwealth submits that for the foregoing reasons, this Honorable Court should deny the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Alan Katz, Assistant Attorney General of Virginia, am a member of the Supreme Court of the United States and that on the 26th day of October, 1977, I mailed with first-class postage prepaid three true copies of this Respondent's Brief in Opposition to Grant of Certiorari to Howard I. Legum, Esquire, Fine, Fine, Legum & Fine, 720 Law Building, Norfolk, Virginia 23510.

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